(3)

NO. 90-200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MISSOURI PACIFIC RAIROAD COMPANY D/B/A UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

H. W. MITCHELL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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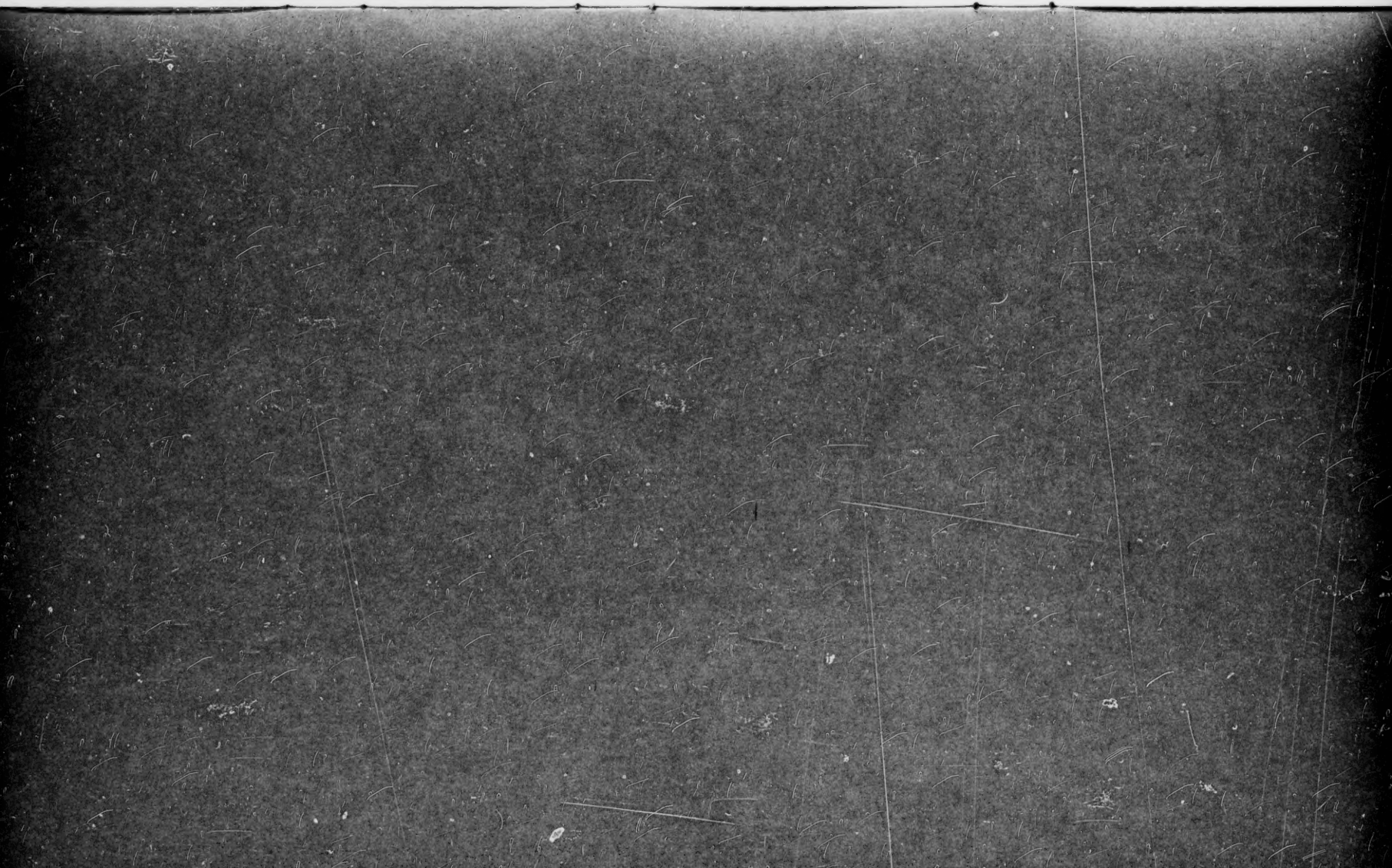

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I. THE TRIAL COURT, AND NOT THE PARTIES, GIVES THE CHARGE TO THE JURY IN TEXAS. THE TRIAL JUDGE'S EXPERIENCE WITH FELA CASES IS IRRELEVANT AND OUTSIDE THE RECORD.

On page 4 of the Respondent's Brief in Opposition, the Respondent states that "[t]he specific wording of this instruction was not requested by either party. Instead,

the trial court—which had never before tried a FELA case—drafted the instruction on its own after the charge conference." This statement is outside the record and is patently preposterous. The Respondent erroneously suggests that by assuming responsibility for the charge given to the jury, the trial court acted improperly. In Texas, it is the trial court's duty to prepare and in open court deliver a written charge to the jury. Tex. R. Civ. P. 271; 3 R. McDonald *Texas Civil Practice in District and County Courts* § 12.24 (rev. 1970). After the judge prepares and files the charge, the parties or their attorneys are given an opportunity to present objections and to request additions to it. Tex. R. Civ. P. 272; 3 R. McDonald, *supra,* § 12.25. The trial judge followed proper procedure in this case. Respondent's statement is irrelevant, outside the record, and should be ignored.

II. NEITHER THE RESPONDENT NOR THE SUPREME COURT OF TEXAS GRASPS THE DISTINCTION BETWEEN KNOWLEDGE OF A DANGEROUS CONDITION AS A PREREQUISITE TO A FINDING OF NEGLIGENCE AND FORESEEABILITY OF HARM AS A FACTOR IN CAUSATION.

The Respondent's Brief simply reiterates his befuddlement, as well as that of the Texas Supreme Court, in attempting to explain why, on the one hand, an instruction on the employer's knowledge is proper in a FELA case before that employer can be found negligent, and why, on the other hand, the instruction before this Court "effectively forced the plaintiff to prove foreseeability in order to establish causation, in clear violation of the

substantive requirements of the FELA." (*See* Petition For Writ of Certiorari, p. 5a). The opening words of the jury issue in question demonstrate that foreseeability is not to be considered in determining causation:

"Whose negligence, if any, *was a cause, in whole or in part, however slight,* of the occurrence of January 21, 1984 which has been made the basis of this suit?" (*See* Petition For Writ of Certiorari, p. 55a) (emphasis supplied).

Petitioner requests the Court to address the method by which a FELA case involving a transitory danger is to be submitted to the jury. The "recommended" language of a pattern charge is not equivalent to the language required to fulfill the intent of Congress.

CONCLUSION

For these reasons, and for those set out in the Petition for Writ of Certiorari, the Petitioners request that certiorari be granted, and that the judgment of the Supreme Court of Texas be reversed. The Texas Supreme Court's opinion conflicts with the well settled principles established in decisions of this Court and other courts,

and will cause Texas jury charges under FELA to be inconsistent with those of every other jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gay C. Brinson, Jr., a member of the bar of this Court, certify that on this 1st day of October, 1990, three copies of the Petitioner's Reply to Brief in Opposition were mailed, first class postage prepaid, to the person listed below, and that all parties required to be served have been served.

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